IN THE

# Supreme Court of the United States

October Term, 1965

No. 5233

JAMES J. WALDRON,

*Petitioner,*

*against*

MOORE-McCORMACK LINES, INC.,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming the dismissal of the petitioner's claim at the close of all the evidence.

### Opinions Below

The opinion of the Court of Appeals is reported at 356 F. 2d 247, and is reprinted in the Appendix *infra* (A1 to A12)*.

The opinion of the District Court for the Southern District of New York (Charles H. Tenney, U. S. D. J.) is not reported and is reprinted in the Appendix *infra* (A13 to A14).

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* Page numbers beginning with "A" refer to the Appendix to this Petition.

Page numbers ending in "a" refer to the transcript of the Trial Record reprinted as the Appendix to the Court of Appeals. Nine copies of that Appendix have been filed with the Clerk of the Court.

## Jurisdiction

The judgment of the Court of Appeals was entered on January 31, 1966 (A15). Extension of time to file a petition for rehearing and rehearing en banc was granted on February 7, 1966. Such petitions were timely filed and were denied, without opinion, on March 17, 1966.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## Questions Presented

Whether a seaman is confined to proof of negligence and the application of the doctrine of unseaworthiness is excluded, as a matter of law, when an insufficient number of men are provided for a particular task and an unsafe method of using otherwise safe gear is adopted?

Whether a distinction should be made between an injury arising out of insufficient gear and an injury arising out of insufficient manpower provided for a particular task in determining the application of the doctrine of unseaworthiness?

Whether the fact that there was an overall sufficiency of manpower aboard ship is a complete defense to liability for unseaworthiness for an injury arising out of shortage of personnel in the performance of a particular task?

Whether the manner of use of otherwise safe equipment may give rise to liability for unseaworthiness?

## Statement of the Case

On May 8, 1960, respondent's vessel was docking at its Brooklyn pier (2a). Petitioner, an able-bodied seaman, was participating in the docking operation from the stern of the vessel (3a).

The usual docking crew at the stern consisted of five unlicensed personnel and the Third Mate (27a, 55a, 62a). The docking operation commenced at 1:20 P. M. and was over at 1:31 P. M., a total of 11 minutes (11a-12a, 47a).

During the docking operation an additional line was put out from the vessel to the dock from a chock somewhat farther forward in the stern area than was usually employed. Petitioner and another seaman, Walter Chowaniec, were directed by the Third Mate Tarantino to let out this additional line (5a, 18a-19a).

This line was 8-inch manila rope (6a). It was coiled approximately 56 feet from the chock through which it was to be let out (19a, 21a, 26a).

There was evidence that the steel deck surface between the coiled rope and the forward chock was moist from fog and rain, tacky from wet paint, and of difficult and slippery footing (3a, 12a-15a, 20a). The work of putting out the lines had to be, and was being, performed "as quickly as possible" (19a, 48a).

The 56 feet of line, if dry, weighed 104.72 pounds. If wet, it weighed more, and the evidence suggested that it was wet (14a-15a).

While Chowaniec and the petitioner were hauling this line towards the chock, petitioner fell and injured his back (10a, 20a, 21a).

Petitioner's maritime expert, Dewey Darrigan, a seaman for fifty years and a licensed captain for twenty-five years (22a-23a), testified that the particular job of carrying this line from where it was coiled to the chock required "three or four men" (33a, 36a, 42a, 46a, 52a, 53a). In Captain Darrigan's experienced and expert opinion the manila line should not have been used and carried in this manner and the performance of the task by only two men "was an unsafe operation" (37a).

Respondent presented proof that the overall number of seamen aboard the vessel met the Coast Guard minimum requirements and that the overall number of men assigned to the docking crew at the stern of the vessel at the time of the accident constituted the usual number of five men and one officer (54a-55a, 62a).

Respondent's contention was that the other three men were engaged in necessary tasks at the time of the accident, and that its liability, if any, as a matter of law, lay only in negligence with respect to the improvidence, if any, of the Third Mate's order assigning only two men to the task (26a-28a, 31a-32a, 54a-56a).

At the close of the trial on April 16, 1964, the trial court (Tenney, J.) dismissed petitioner's claim of unseaworthiness with respect to the alleged shortage of personnel for the task at hand and refused to submit it to the jury (55a-56a).* Judge Tenney rendered a written opinion upon petitioner's post-trial motion for a new trial (59a-61a), made on April 27, 1964 (58a) and decided on November 9, 1964 (63a). He adhered to his dismissal on the grounds of the decision in *The Magdapur*, 3 F. Supp. 971 (S. D. N. Y. 1933) and "certain language" in the opinions in *Pinto* v. *States Marine Corp. of Delaware*, 296 F. 2d 1, 3 (2d Cir. 1961), pet. for rhg. den., 296 F. 2d 8, cert. den. 369 U. S. 843, 891 and *Ezekiel* v. *Volusia Steamship Co.*, 297 F. 2d 215, 217 (2d Cir. 1961), cert. den. 369 U. S. 843 (Opinion of Tenney, J.; A13-A14).

On the appeal to the Court of Appeals, the dismissal was affirmed by a divided panel, Senior Judge Medina writing for himself and Chief Judge Lumbard and Circuit Judge Smith dissenting (356 F. 2d 247; A1-A12).

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* Judge Tenney had made a contrary ruling earlier in the trial; i.e., that "the failure to supply a sufficient number of men on this particular operation . . . constituted unseaworthiness' (28a, see also, 31a-32a).

Judge Medina's opinion extensively reviews the law of unseaworthiness and notes the absolute nature of the liability to seamen injured during the performance of their employment duties (356 F. 2d at 249-251; A4-A8). Judge Medina's opinion recognizes that unseaworthiness may be found by a jury although only a portion of the ship's equipment is defective, although safe gear is available but is not used for the particular work involved and although the gear itself is not defective but a maladjustment or misuse of it creates a dangerous condition (356 F. 2d at 250; A6-A7). However, Judge Medina's opinion concludes that these principles of liabiilty apply only to defects, nonuse or misuse of gear or equipment, and do not apply where the dangerous condition arises out of nonuse of misuse of ship's personnel (356 F. 2d at 251-2; A9-A10). His opinion takes the position that with respect to the crew all that is required is that the vessel have an overall sufficiency of manpower, that any failure to provide sufficient personnel for a particular task may not constitute unseaworthiness and that liability, if any, arising out of such circumstances must be based on a proof of personal negligence or "imprudent action" on the part of the officer responsible for allocating and assigning the personnel or proof of inherent incompetence on the part of the officer (356 F. 2d at 251-2; A9-A10).

Judge Smith, dissenting, stated that there were two independent grounds on which unseaworthiness could have been found. The first was that the handling of the otherwise seaworthy manila rope by only two men, when there was expert testimony that three or four men were required, constituted a misuse of otherwise seaworthy gear. According to Judge Smith the creation of a dangerous condition by such misuse of gear was a ground for unseaworthiness liability under principles stated by this Court in *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959) and directly applicable recent decisions of the 3rd and 9th Circuits (356 F. 2d at 252; A11).

Secondly, upon the conceded principle that an insufficiently manned vessel may be found unseaworthy and petitioner's proof that there was a shortage of personnel provided at the time and place his task was done, unseaworthiness liability could lie. Judge Smith observed that respondent's defense "that the crew was as a whole complete" was "another form [of] the defense rejected in *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96 (1944)" (356 F. 2d at 253; A12). Judge Smith stated that the decision in *The Magdapur*, 3 F. Supp. 971 (S. D. N. Y. 1933) to the contrary, heavily relied upon by the majority (see 356 F. 2d at 251; A9), decided 33 years ago, "cannot stand in the face of the development of the doctrine in the intervening years, illustrated by the holding in *Mahnich*" (356 F. 2d at 253; A12).

## Reasons for Granting the Writ

Rule 19(1)(b) of this Court's rules state that among the criteria for granting a writ of certiorari are:

> "where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; . . . or has so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision."

We respectfully submit that while any one of these grounds presumably is sufficient to justify the issuance of a writ, in the instant case all of these grounds apply, making this case an overwhelmingly meritorious candidate for review by this Court.

**Conflict with other courts of appeals**

There is direct inter-circuit conflict between the majority decision below in this case on one hand and the opinions of the Ninth Circuit in *American President Lines Ltd.* v. *Redfern,* 345 F. 2d 629 (1965) and the Third Circuit in *Ferrante* v. *Swedish-American Lines,* 331 F. 2d 571 (1964), pet. for cert. dismissed pursuant to R. 60, 379 U. S. 801 and *Thompson* v. *Calmar SS. Corp.,* 331 F. 2d 657 (3rd Cir. 1964), cert. denied 379 U. S. 913 on the other hand.* *Hroncich* v. *American President Lines, Ltd.,* 334 F. 2d 282 (3rd Cir. 1964), *Scott* v. *Isbrandtsen Co., Inc.,* 327 F. 2d 113 (4th Cir. 1964) and *Blassingill* v. *Waterman SS. Corp.,* 336 F. 2d 367 (9th Cir. 1964) are also in conflict with the prevailing position below in this case.

In *Redfern,* the seaman's immediate superior ordered him to go down alone to the engine room and open a large sea valve. The exertion of performing this task injured his back. On a libel tried before a judge alone, he recovered a substantial verdict specifically on the grounds of unseaworthiness (345 F. 2d at 630, 631).

The record on appeal in *Redfern* demonstrates that there was no claim of any overall shipboard shortage of manpower nor was it the "tendency to stick" of the valve that constituted the unseaworthy condition (345 F. 2d at 632). The Ninth Circuit specifically held that the vessel was unseaworthy on the grounds of being "improperly manned" (345 F. 2d at 632), and that the operation of the otherwise seaworthy valve by one man alone, where two men were required, constituted "a dangerous condition" (345 F. 2d at 631), justifying the trier of facts' finding of liability for unseaworthiness.

In the instant case, petitioner was lifting and hauling heavy manila line instead of opening a large sea valve. In

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* Respondent conceded the conflict with the Third Circuit decisions below. Appellee's Brief to the Court of Appeals, pp. 15-16, a copy of which has been lodged with the Clerk of the Court.

the instant case, the plaintiff's expert testimony stated that 3 or 4 men were required to handle this equipment properly; in *Redfern*, the necessary minimum was two men.

We fail to see any substantive distinction between the *Redfern* case and the case at bar. *Redfern* is the same case of misuse of otherwise proper gear and provision of insufficient manpower as is the instant case.

In both *Ferrante and Thompson, supra,* page 7, the Third Circuit, in extensive opinions, held that where the method of operation and use of safe equipment gave rise to an unsafe condition, liability for unseaworthiness, without any showing of negligence on the part of the shipowner or its employees, could be found. The Third Circuit in *Thompson* quoted and itself emphasized the following from this Court's decision in *Morales* v. *City of Galveston,* 370 U. S. 165, 170 (1962):

> "'A vessel's unseaworthiness might arise from any number of individualized circumstances. Her gear might be defective, her appurtenances in disrepair, her crew unfit. *The method of loading her cargo*, or the manner of its storage might be improper. (Emphasis supplied)'" (331 F. 2d at 65)

In *Ferrante,* the Court's opinion contained a full review of the recent authorities imposing unseaworthiness liability for adoption of improper "method of operation" (331 F. 2d at 577). It noted this Court's decisions indicating the "doctrinal trends" (331 F. 2d at 578) toward completing the protection of the maritime worker injured by an industrial accident. The Court reversed the lower court's dismissal of the libel on the ground that the "stevedore's method" (331 F. 2d at 578) rendered the vessel unseaworthy, stating:

> "Whether the operation is regarded as 'stowage' of the piles of boards as part of the discharge

> process, or the construction of a 'draft', or as the mere use of the ship's equipment—the manila ropes —fact remains that the stevedore 'failed to perform safely, a basis for liability including negligent and nonnegligent conduct alike', and that made the ship unseaworthy." (331 F. 2d at 578)

In *Scott* v. *Isbrandtsen Co., Inc.*, 327 F. 2d 113 (4th Cir. 1964), the longshoreman was injured when a bale that should have been handled by two men was handled by one man and got loose and fell upon him (327 F. 2d at 124). The Fourth Circuit held that this:

> ". . . method of operation may present a factual issue as to whether an unseaworthy condition is created for which the shipowner may be held liable" (327 F. 2d at 125-6).

The Court reversed and remanded for a new trial because of the trial court's failure to submit that issue to the jury (327 F. 2d at 128).

*Hroncich* v. *American President Lines Ltd.*, 334 F. 2d 282, 285 (3d Cir. 1964) is almost identical to *Scott*, and similarly holds that the method of operation, if improper and unsafe, may constitute unseaworthiness.

Similarly, the Ninth Circuit in *Blassingill* v. *Waterman Steamship Corp.*, 336 F. 2d 367, 368-70 (1964) flatly held that "an improper method of using" sound gear may constitute unseaworthiness, and that it was error for the trial court to refuse to submit such an issue to the jury.

The above-cited recent cases make clear that at least in the Third, Fourth and Ninth Circuits stevedores and longshoremen can impose unseaworthiness liability upon a vessel by ordering or adopting an improper method of work. If such improper method of work, adopted without the control or knowledge of the shipowner's officers,

can impose unseaworthiness liability, *a fortiori*, an improper work method, adopted by a crew member pursuant to a ship officer's directive, may similarly render the vessel unseaworthy.

These cases, finding grounds of unseaworthiness liability upon an analysis and consideration of the human element which by misuse or nonuse converts otherwise safe equipment into dangerous conditions, are obviously of recent vintage. This development of the law in this significant area has not been fully accepted by the Second Circuit, several of whose decisions stand in conflict with that of the other circuits. See *Guarracinno* v. *Luckenbach SS. Co.*, 333 F. 2d 646, 648 (2d Cir. 1964), cert. den. 379 U. S. 946; *Puddu* v. *Royal Netherlands S.S. Co.*, 303 F. 2d 752, 755 (2d Cir. 1962, Clark, J., dissenting), cert. den. 371 U. S. 840; *Pinto* v. *States Marine Corp. of Del.*, 296 F. 2d 1, 7 fn. 6 (2d Cir. 1961), cert. den. 369 U. S. 843, 891.

The decision in the instant case plainly involves direct conflict with the *Redfern, Ferrante, Thompson* and other decisions of three other circuits. These severe conflicts between decisions of courts of appeals on two separate, important and recurring grounds—liability for unseaworthiness for shortage of personnel at a particular time and place notwithstanding overall sufficiency of manpower aboard ship and unseaworthiness liability for an improper method of operation where seaworthy equipment is used in a manner which creates an unsafe condition—make this case, we respectfully submit, an especially strong candidate for the grant of certiorari.

**Conflict with Supreme Court authorities**

The sole basis for upholding the dismissal below is the claim that notwithstanding the evidence that there was a shortage of manpower at the time and place the work was done, the existence of an overall sufficient complement of

men aboard the ship rendered the claim invalid as a matter of law.*

Precisely this defense was struck down by this Court in *Mahnich* v. *Southern SS. Co.*, 321 U. S. 96, 103-4 (1944). There a mate, without negligence, selected and provided a rope with a latent defect, with resulting injuries to a seaman. Sufficient safe rope was aboard the vessel. This Court held that the concepts of strict liability under the unseaworthiness doctrine:

> "required that safe appliances be furnished when and where the work is to be done." (321 U. S. at 104)

As to the defense that there was sufficient safe rope aboard the vessel, the Court held:

> "nor does the fact that there was sound rope on board to rig a safe staging * * * afford an excuse to the owner for the failure to provide a safe one." (321 U. S. at 103).

The issue here involved may also be analyzed as giving rise to unseaworthiness liability because of a dangerous condition caused by an improper method of operation and misuse of otherwise seaworthy equipment. The decisions below refused to recognize and apply the basic principles laid down by this Court in *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959).

In *Crumady* stevedores used a winch and cargo loading equipment which had a maximum safe working load of 3 tons and was in good condition, but set the cut-off device at 6 tons (358 U. S. at 425). Although the equipment was not inherently defective and the dangerous condition arose only because of the maladjustment of the safety device,

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* It is beyond dispute that overall insufficiency of manpower aboard ship constitutes "a classic case of an unseaworthy vessel". *June T., Inc.* v. *King*, 290 F. 2d 404, 407 (5th Cir. 1961); *DeLima* v. *Trinidad Corp.*, 302 F. 2d 585, 587 (2d Cir. 1962); *In re Pacific Mail S. S. Co.*, 130 F. 76, 82 (9th Cir. 1904).

these acts gave rise to an unseaworthy condition, irrespective of whether there was also negligence. This Court stated:

> "The *winch*—an appurtenance of the vessel—*was not inherently defective* as was the rope in the Mahnich case. *But it was adjusted* by those acting for the vessel owner *in a way that made it unsafe and dangerous for the work at hand.* While the rigging would take only three tons of stress, the cut-off of the winch—its safety device—was set at twice that limit. This was rigging that went with the vessel and was safe for use within known limits. Yet those limits were disregarded by the vessel owner when the winch was adjusted. *The case is no different in principle from loading or unloading cargo with cable or rope lacking the test strength for the weight of the freight to be moved.* In that case the cable or rope, in this case the winch, makes the vessel pro tanto unseaworthy." (358 U. S. at 427-8). (Emphasis added.)

Similarly, in the instant case, the Third Mate's adjustment of his work force, by providing only two men to haul or handle a load where the strength of additional men was required, and the method of operation of hauling the rope by only two men, must be deemed to have given rise to a jury issue as to the creation and presence of an unseaworthy condition. See also, *Morales* v. *City of Galveston,* 370 U. S. 165, 170 (1962); Note: *Doctrine of Unseaworthiness in the Lower Federal Courts,* 76 Harv. Law Rev. 819, 828 (1963).

This Court's opinions of the past 20 years have broadly expanded the notion and the coverage of unseaworthiness, as was explicitly noted in *Mitchell* v. *Trawler Racer, Inc.,* 362 U. S. 539, 550 (1960), *Scott* v. *Isbrandtsen Co.,* 327 F. 2d 113, 123 (4th Cir. 1964), *Ferrante* v. *Swedish-American Lines,* 331 F. 2d 571, 578 (3rd Cir. 1964) and Gilmore & Black, *The Law of Admiralty* (1957), p. 253, fn. 12. It is now clear that a failure to provide reasonably safe work-

ing conditions to a seaman, albeit a temporary, slight or uncorrectible failure, may impose strict liability upon the shipowner rather than leave the burden upon the injured seaman alone. See, *e.g., Mahnich* v. *Southern S.S. Co., Inc., supra; Seas Shipping Co.* v. *Sieriacki,* 328 U. S. 85, 92-6 (1946); *Boudoin* v. *Lykes Bros. S.S. Co., Inc.,* 348 U. S. 336, 339 (1955); *Crumady* v. *The Joachim Hendrick Fisser, supra; Mitchell* v. *Trawler Racer, Inc., supra; Michalic* v. *Cleveland Tankers, Inc.,* 364 U. S. 325, 327-8 (1960); *Gutierrez* v. *Waterman S.S. Corp.,* 373 U. S. 206, 213 (1963); *Reed* v. *The Yaka,* 373 U. S. 410, 413 (1963).

The decisions below in the instant case would carve out from the protection of these strict liability principles of unseaworthiness the ordinary, frequently recurring accident case where a low echelon laborer aboard ship is directed, alone or with insufficient help, in the exigencies and possible haste of shipboard employment, to haul, pull, lift or tug a heavy piece of equipment or object aboard ship and is thus injured.

Had the manila line here involved been hauled on a dolly or hand truck of insufficient strength which collapsed, a jury issue as to liability for unseaworthiness would surely have been presented. That the load-carrying mechanism was too weak because of shortage of personnel can, in logic or social policy, dictate no different result.

Inexplicably, Judge Medina's opinion below applies this arbitrary and artificial distinction and insists on denying strict liability protection to the injured seaman if the order involves provision of personnel rather then selection of gear. Such a distinction is precisely contrary to this Court's view expressed in *Boudoin* v. *Lykes Bros. SS. Co.,* 348 U. S. 336 (1955), where it stated that on the issue of unseaworthiness there is:

> "no reason to draw a line between the gear on the one hand and the ship personnel on the other". (348 U. S. at 339)

The extraordinary and arbitrary nature of the decisions below is pointed up by the fact that petitioner's negligence claim was not dismissed, but the unseaworthiness claim was held legally insufficient (56a). Mr. Justice Frankfurter pointed out that "it will be rare that the circumstances of an injury will constitute negligence but not unseaworthiness", *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 418 (1953), and Professors Gilmore and Black have noted that such a circumstance is an "almost theoretical construct". Gilmore and Black, *The Law of Admiralty* (1957), p. 320. The Second Circuit has now extended this "rare" and "theoretical" concept into a systematic barrier to jury determination of this common type of maritime accident. See *Pinto* v. *States Marine Corp. of Del.*, 296 F. 2d 1 (2d Cir. 1961), cert. den. 369 U. S. 843, 891 (1962) and *Ezekiel* v. *Volusia SS Corp.*, 297 F. 2d 215 (2d Cir. 1961), cert. den. 369 U. S. 843 (1962). The *Pinto* decision, adopted by a sharply divided Court (see 296 F. 2d at 8) and relied upon by the trial and appellate courts below (356 F. 2d at 252; A10; A14), has drawn the criticism of commentators * even before its expansion in the instant case, and has not been followed by any of the other circuits.

The petitioner produced proof that additional assistance should have been provided. Nevertheless, the courts below held he was to be denied the right to submit his case to a jury, unless he could prove that the officer at the scene, responding to the shipboard conditions, was inherently incompetent or negligent in directing the urgent work (356 F. 2d at 251-2; A8-A10).

It was precisely to avoid placing these difficult burdens of proof upon the injured seaman that the entire doctrine of unseaworthiness was created and developed, and we respectfully submit that this Court should review this issue

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* See Note: *Doctrine of Unseaworthiness in the Lower Federal Courts*, 76 Harv. Law Rev. 819, 824 (1963).

before this substantial exception to the humanitarian doctrine of unseaworthiness is permitted to be carved out by the majority opinion below.

**Issue should be settled by this Court**

It is axiomatic that use of inadequate equipment such as a defective rope or cable to support a heavy load may constitute unseaworthiness. This doctrine should apply with equal logic and force to the use of inadequate manpower to support a heavy load. In short, whether a rope that is too thin or frayed or a number of men that are too few or weak are employed for a particular lifting operation aboard ship, the liability for unseaworthiness should be identical.

Notwithstanding its apparent common and fundamental nature, the issue of whether unseaworthiness liability may be found for shortage of personnel for a particular task on an otherwise fully manned vessel has never been dealt with directly by this Court, and, except for the instant case, has been determined directly in only two lower court decisions. *American President Lines, Ltd.* v. *Redfern,* 345 F. 2d 629 (9th Cir. 1965), decided in favor of the seaman, and *The Magdapur,* 3 F. Supp. 971 (S. D. N. Y. 1933) decided in favor of the shipowner.

*Redfern* has been previously discussed (pages 7-8, *supra*). *The Magdapur* was decided 33 years ago, long before this Court's landmark decisions in *Mahnich, Boudoin, Crumady* and *Mitchell.* See also, the pioneering opinion of Judge Learned Hand in *Keen* v. *Overseas Tankship Corp.,* 194 F. 2d 515 (2d Cir. 1952), which first established the equivalence of failures of ship's gear and ship's personnel in giving rise to liability under the doctrine of unseaworthiness.

However, if the decision below is left unreviewed and standing, it breathes new vitality into the *Magdapur* doc-

trine upon which it specifically relies * (356 F. 2d at 251-2; A9-A10; A14).

Both of these areas and concepts are of substantial importance in the maritime law. Provision of insufficient personnel or assistance to carry, move or lift a heavy object or loan aboard ship often gives rise to injury to lower echelon maritime employees.** As technological advancement improves and refines mechanical equipment, those injuries which do occur are more and more the result of the human misuse of otherwise fit gear.

This case combines and presents these two critical issues, which have given rise to sharp differences in views below and as to which "the lower courts are at odds", and cer-

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* Even were the restrictive concepts of the *Magdapur-Waldron* doctrine applied only in the Second Circuit (and they have already been repudiated by the Ninth Circuit in *Redfern*) there would be sufficient justification for granting certiorari. "Half of all Federal admiralty and Jones Act claims are begun in Second Circuit trial courts." Note: *En Banc Hearings*, 40 N. Y. U. Law Rev. 563, 588 (May 1965). Even were there an absence of direct conflict with decisions of other courts of appeals, the concentration of such litigation in Second Circuit courts should constitute an independent ground for granting the writ of certiorari.

** Thus, several recent cases in the Southern District of New York have presented this question; i.e. whether an unseaworthiness claim arising out of alleged insufficiency of assistance for the lifting or handling of heavy equipment aboard ship should be submitted to the jury. *Instant case* (Tenney, J.; dismissal granted, April 16, 1964); *Escobar* v. *Alcoa S. S. Lines Co.* (60 Civ. 2396, McGohey, J.; Charge to Jury, January 21, 1965); *Presenski* v. *Moore-McCormack Lines, Inc.* (62 Civ. 3757, Levet, J.; Charge to Jury, May 20, 1965); *Almadovar* v. *Luckenbach S. S. Co. Inc.* (Civ. 133-139, Feinberg, J.; Charge to Jury, October 27, 1961). In the instant case Judge Tenney dismissed the seaman's unseaworthiness claim. In the other three cases, the District Judges submitted the seamen's unseaworthiness claims for jury determination.

tiorari should be granted so that this Court may decide and resolve the issues. *Fitzgerald* v. *U. S. Lines Co.*, 374 U. S. 16, 17 (1963).

**Supervisory function of this Court**

This Court has emphasized that in seamen's cases the jury "plays a pre-eminent role". *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 523 (1957); *Michalic* v. *Cleveland Tankers Inc.*, 364 U. S. 325, 330-1 (1960). It has repeatedly held that directed verdicts and dismissals of seamen's claims are to be granted only in the rarest circumstances. The policy of the majority of this Court has been to exercise a strong supervisory function to prevent interference with or "erosion" of the role of the jury in the determination of FELA and seamen's cases, and writs of certiorari have been particularly granted "when the statutory or constitutional right to decision by a jury is in issue". *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 509 (1957); Stern and Gressman, *Supreme Court Practice* (3rd Ed., § 4-15, p. 144-5 and authorities there cited.

In the instant case, petitioner presented eye-witness testimony that he was injured while hauling a heavy manila line on the ship's deck, while acting pursuant to orders and in the direct line of the duties of his maritime employment. Petitioner also presented expert testimony by a ship's master of 50 years' maritime experience that the performance of this task by only two men involved a shortage of personnel and an unsafe method of operation.

The court below dismissed this claim as a matter of law and took away its determination from the jury which had heard the evidence. This was an extreme "departure by a lower court" from the principles of law controlling the petitioner's right to a jury trial and "call for an exercise of this court's power of supervision". Rule 19(1)(b), Supreme Court Rules.

## CONCLUSION

**Several substantial grounds for granting a writ of certiorari have been established. They are:**

**1. Conflict with the decisions of other courts of appeals on the same matters;**

**2. Conflict on a Federal question with applicable decisions of this Court;**

**3. Presentation of important questions of federal law which have not but should be settled by this Court; and**

**4. Deprivation of petitioner's right to a jury trial so as to call for an exercise of this Court's power of supervision.**

**We respectfully submit that this case presents several of the most important and unsettled aspects of maritime law which are repeatedly presented to the lower Federal courts, as to which the lower courts are at odds and which require resolution by this Honorable Court.**

**For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.**

Respectfully submitted,

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## (APPENDIX)

### Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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No. 93—September Term, 1965.

(Argued October 27, 1965 Decided January 31, 1966.)

Docket No. 29504

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JAMES J. WALDRON,

Plaintiff-Appellant,

*against*

MOORE-McCORMACK LINES, INC.,

Defendant-Appellee.

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Before:

LUMBARD, *Chief Judge*,
MEDINA and SMITH, *Circuit Judges*.

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Appeal from a judgment and an order of the United States District Court for the Southern District of New York, Charles H. Tenney, Judge.

Plaintiff, a seaman, appeals from a judgment for defendant shipowner in a personal injury case in which, at the close of all the evidence, one of plaintiff's unseaworthiness claims was dismissed, and from an order denying plaintiff's motion for a new trial. Opinion below not reported. Affirmed.

THEODORE H. FRIEDMAN, New York, N. Y. (Henry Isaacson, and Phillips, Nizer, Benjamin, Krim & Ballon, New York, N. Y., on the brief), for plaintiff-appellant.

WILLIAM M. KIMBALL, New York, N. Y. (Burlingham Underwood Barron Wright & White, New York, N. Y., on the brief) for defendant-appellee.

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MEDINA, *Circuit Judge*:

James J. Waldron, an able seaman and a member of the crew of the SS Mormacwind, fell and injured his back as he and another member of the crew were hauling a heavy manila mooring line along the deck of the vessel during a docking operation. The issue of negligence and several features of the issue of unseaworthiness, as claimed by Waldron, were submitted to the jury who returned a verdict for defendant. One of the unseaworthiness claims against the shipowner having been dismissed and the motion for a new trial denied, the seaman appeals. The sole question before us on this appeal is whether the trial judge committed error when he refused to permit the jury to pass upon Waldron's additional claim of unseaworthiness based upon an order of the third mate that 2 men were to carry the line from where it was coiled on a grating on the deck to a mooring chock approximately 56 feet away. There was expert evidence to the effect that 3 or 4 men rather than 2 were required to carry the line in order to constitute "safe and prudent seamanship." It is not disputed that the vessel was properly and fully manned and that the crew including the officer who gave the order were in all respects competent to perform their duties.

The findings implict in the verdict are: (1) that the order given by the third mate was not a negligent order, that is to say, plaintiff failed to convince the jury that under the circumstances a reasonably prudent man would not have given such an order; and (2) that the vessel was not unseaworthy because the deck was tacky from wet paint or was wet and slippery. No shore workers are involved nor is there any claim of a defect in the vessel or any of its gear, equipment and appliances.

I.

According to the log, the docking operation of SS Mormacwind at her Brooklyn pier was consummated in 11 minutes, between 1:20 and 1:31 P.M. on May 8, 1960. Coast Guard regulations required the vessel to carry on deck, in the unlicensed category, 6 able seamen and 3 ordinary seamen. In fact, she carried a boatswain and two deck utility men in addition. Thus the SS Mormacwind had three more unlicensed deck crewmen than her certificate required and all of them were on board during the docking operation.

Waldron was working in the aft docking gang on the starboard side of the ship, inboard, under the command of Tarantino, the third mate. The usual complement of this gang was 3 able seamen and 2 ordinary seamen. On this particular occasion, Tarantino had under his orders 4 able seamen, including Waldron, and 1 ordinary seaman.

As the operation progressed with the requisite dispatch, the officer on the bridge decided another mooring line was necessary as a spring line and the order was passed on to Tarantino. As all the other men were occupied with urgent tasks connected with the other lines, Tarantino assigned to Waldron and another able seaman, who was exceptionally strong and capable, the task of putting out this new line "as quickly as possible." The other seaman took the eye of the line, threw about 15 feet of slack "over one

shoulder and over the other," and had reached the chock. Waldron was tugging at the top of the coil, attempting to flake some slack along the deck, when he slipped and fell.

Waldron's position on the particular phase of the claim of unseaworthiness that Judge Tenney refused to submit to the jury was very clear to the effect that "[i]t is a question of how many men were assigned to this particular job." It made no difference how well the vessel was manned. Nor was it of consequence that an adequate number of competent seamen were assigned to the group handling the lines aft under the direction of the third mate. "There could have been a hundred men on the stern, or five." Similarly, he contended that other factors, such as the urgency of getting out the new line, the tasks being performed by the other men, the condition of the current, wind and so on, were absolutely irrelevant to the issue of unseaworthiness, even though they did have a bearing on the issue of negligence.

We agree with Judge Tenney, whose short memorandum opinion is not reported, and we affirm.

II.

The doctrine of unseaworthiness has had a long history. The so-called warranty of seaworthiness in early American law has its roots in contracts of marine insurance and affreightment, under which liability was conditioned on the vessel being "sufficient in all respects for the voyage; well-manned, and furnished with sails and all necessary furniture." 1 Conkling, Admiralty Jurisdiction, 164-5 (1848). A similar requirement, stemming from the ancient codes, was implied in contracts for the carriage of goods and passengers by sea. Abbott, Merchant Ships and Seamen, 178-9 (1802); see *The Caledonia*, 1895, 157 U. S. 124. This duty to provide a seaworthy vessel was absolute, see *Work* v. *Leathers*, 1878, 97 U. S. 379-80; Abbott, Merchant Ships

and Seamen, *supra,* at 178, 181; and, even in its early foundations, seaworthiness was a threefold concept: the vessel must be "tight and staunch," her gear, equipment and appliances must be serviceable and in good order, and the crew, including the master and his subordinates, must be competent and sufficient in number to man the ship. 1 Parsons, Maritime Law 122 (1859); Desty, Manual of the Law Relating to Shipping and Admiralty, Section 232 (1879); *Lord* v. *Goodall S.S. Co.,* C. C. D. Cal., 1877, 15 Fed. Cas. 884, 887-88 (No. 8,506), aff'd on other grounds, 1880, 102 U. S. 541; *In re Meyer,* N. D. Cal., 1896, 74 Fed. 881, 885; *The Gentleman,* S. D. N. Y., 1845, 10 Fed. Cas. 190, 192 (No. 5,324), rev'd on other grounds, C. C. S. D. N. Y., 10 Fed. Cas. 188 (No. 5,323); *Tait* v. *Levi,* [K. B. 1811] 14 East 481.

For a variety of reasons, historical, ethical, sociological and others, we should not be surprised to find that the interests of cargo owners and passengers were paramount in the early days just referred to. Humanitarian considerations were not in vogue. Although the unseaworthiness of a vessel gave a seaman the right to abandon ship without penalty and to be paid his wages, see *Dixon* v. *The Cyrus,* D. Pa., 1789, 7 Fed. Cas. 755 (No. 3,930); *Rice* v. *The Polly and Kitty,* D. Pa., 1789, 20 Fed. Cas. 666 (No. 11,754), and mariners were entitled to maintenance and cure for injuries suffered in the service of the ship, see *Harden* v. *Gordon,* C. C. D. Me., 1823, 11 Fed. Cas. 480 (No. 6,047), the early maritime law afforded no remedy by way of compensatory damages for personal injuries. See Lucas, Flood Tide: Some Irrelevant History of the Admiralty, 1964 Supreme Court Review 249, 299; Smith, Liability in the Admiralty for Injuries to Seamen, 19 Harv. L. Rev. 418, 431 (1906).

From 1903 and the much discussed dictum of *The Osceola,* 189 U. S. 158, through the Jones Act in 1920, 41 Stat. 1007, 46 U. S. C., Section 688, the long series of longshoreman cases, down to *Mitchell* v. *Trawler Racer, Inc.,*

1960, 362 U. S. 539, and beyond, there has developed a vast body of federal law concerning the right of a seaman, or a person performing the traditional duties of a seaman, to recover compensatory damages for injuries caused by the unseaworthiness of the vessel. It no longer matters in these personal injury cases whether the unseaworthy condition was caused by the negligence of the shipowner or anyone else. The rule that the so-called warranty applies only to the vessel as she left her home port at the commencement of the voyage, which posed the problem we found so vexing in *Dixon* v. *United States*, 2 Cir., 1955, 219 F. 2d 10, has, at least in some respects, been blown away by the winds of time. But the basic threefold concept of a sound ship, proper gear and a competent crew has remained unchanged. Each of these contributes in a special way to provide "a vessel reasonably suitable for her intended service." *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539, 550, *supra*. It may therefore be profitable briefly to examine the developments in the maritime law applicable to each of these three separate but complementary phases of the warranty of seaworthiness.

Little need be said concerning the requirement of a ship "tight and staunch," as the 1936 Carriage of Goods by Sea Act, 46 U. S. C., Sections 1300 ff., has cut down the shipowner's duty to the exercise of due care only with respect to cargo owners. We have found nothing to indicate that the duty to furnish a sound ship is less than absolute vis-á-vis members of the crew. Pertinent illustrations are cracked plates, *McGee* v. *United States*, 2 Cir., 1947, 165 F. 2d 287, the falling of a rotted signal mast, *Nagle* v. *United States*, S. D. N. Y., 1953 A. M. C. 2109, blobs of grease or spots of oil on the deck or on ladders, *Yanow* v. *Weyerhaeuser S.S. Co.*, 9 Cir., 1957, 250 F. 2d 74, cert. denied, 1958, 356 U. S. 937; *Calderola* v. *Cunard S.S. Co.*, 2 Cir., 1960, 279 F. 2d 475, cert. denied, 364 U. S. 884. Often, and probably

generally, the question is one of fact for the judge or jury as in *Mitchell* v. *Trawler Racer, Inc.*, 1960, 362 U. S. 539, *supra*, where there was fish gurry on the ship's rail. See also *Blier* v. *United States Lines Co.*, 2 Cir., 1961, 286 F. 2d 920, cert. denied, 368 U. S. 836. But there must always be proof on the basis of which a finding of unseaworthiness can be made.

It is with respect to the ship's gear, equipment and appliances that the most significant developments along liberal lines have taken place. It now makes no difference that other safe gear was available but not used. See, e.g., *Mahnich* v. *Southern S.S. Co.*, 1944, 321 U. S. 96. Shore workers, including longshoremen and others performing tasks traditionally the work of seamen, became entitled to the benefits of the warranty of seaworthiness. *Seas Shipping Co.* v. *Sieracki*, 1946, 328 U. S. 85. And the doctrine has been applied to them even if the defective gear was supplied by the stevedore who brought it aboard ship. See, e.g., *Alaska S.S. Co.* v. *Petterson*, 1954, 347 U. S. 396, affirming 205 F. 2d 478 (9 Cir., 1953). Even if the gear or appliances were not defective, a maladjustment might make them dangerous and the vessel could be found unseaworthy. *Crumady* v. *The Joachim Hendrick Fisser*, 1959, 358 U. S. 423. So also with a stuck valve that could only be "broken" by the use of tools or several men working together. *American President Lines, Ltd.* v. *Redfern*, 9 Cir., 1965, 345 F. 2d 629. So also with a portable aluminum ladder leading to the hold which slipped out of place and fell due to the movement of the ship, despite the fact that an officer had placed a man to hold it and had told him to keep watch over it. *Reid* v. *Quebec Paper Sales & Transp. Co.*, 2 Cir., 1965, 340 F. 2d 34. Other instances of dangerous conditions

caused by defects in, or analogous improper use of, various types of gear and equipment could be multiplied.[1]

Many of the cases above referred to, and others, have been cited in appellant's brief. We are urged to take the position in this case that the principles of these gear and equipment cases are applicable here on the theory that any condition aboard ship that is of potential danger to the members of the crew is necessarily a condition of unseaworthiness, irrespective of how it came into existence and, of course, irrespective of any negligence or fault on the part of the shipowner or his agents or the officers or other members of the crew.

The reason we cannot do this is inherent in the traditional triple concept of unseaworthiness. With respect to the crew, including the officers, all that is or has been required is that the vessel be properly manned. That is to say, in order to be "reasonably suitable for her intended service" the vessel must be manned by an adequate and proper number of men who know their business. There is no requirement that no one shall ever make a mistake. If someone is injured solely by reason of an act or omission on the part of any member of a crew found to be possessed of the competence of men of his calling, there can be no recovery unless the act or omission is proved to be negligent. We have found no authority to the contrary. Indeed,

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[1] *Grillea* v. *United States*, 2 Cir., 1956, 232 F. 2d 919, 922, refers to the question "whether a *defect in hull or gear* that arises as a momentary step or phase in the progress of work on board should be considered as an incident in a continuous course of operation" (emphasis supplied). See also *Ferrante* v. *Swedish American Lines*, 3 Cir., 1964, 331 F. 2d 571, petition for cert. dismissed, 379 U. S. 801; *Thompson* v. *Calmar S.S. Corp.*, 3 Cir., 1964, 331 F. 2d 657, cert. denied, 379 U. S. 913.

In *DeLima* v. *Trinidad Corporation*, 2 Cir., 1962, 302 F. 2d 585, there was not only a quantity of oil on the deck of the engine room but the vessel was not properly manned, as 2 of the 3 wipers had left the ship earlier in the voyage and had not been replaced.

this rule seems to us to be based not only on a uniform course of judicial opinion but also on sound reason. In the management of the vessel both at sea and in port, moments of lesser or greater urgency are bound to occur when quick decisions have to be made, and there is always the possibility of what may appear by way of hindsight to be errors of judgment. To alter the rule, in the absence of legislation, would, we think, come close to requiring the shipowner to provide "an accident proof" ship, which the teaching of Mr. Justice Stewart's landmark and highly clarifying opinion in *Mitchell Trawler Racer, Inc.*, 1960, 362 U. S. 539, 550, *supra*, specifically negates.

III.

In any event, the uniform current of authority in this Circuit supports the view and we hold that, if the shipowner has furnished a well-manned ship, with a competent crew, there can be no liability for personal injuries caused by an order of an officer of the ship that is not proved to be such as would not have been made by a reasonably prudent man under the circumstances.

In *The Magdapur*, S. D. N. Y., 1933, F. Supp. 971, Judge Patterson decided the precise question here involved and held that the vessel was not shown to be unseaworthy. The only difference is that 3 men were ordered to move a heavy mooring wire and there was evidence that 6 or 7 men were necessary. The ground of decision was that the warranty of seaworthiness required only an adequate number of competent men in the crew and it was not shown that any of the men on hand and available lacked the skill and ability of men of their calling. "The error was that of the chief officer in assigning to the particular task too few of the men available for work." 3 F. Supp. at 972.

Judge Patterson's ruling in *The Magdapur* was cited with approval by Judge Learned Hand in 1952 in *Keen* v. *Overseas Tankship Corp.*, 2 Cir., 194 F. 2d 515, cert. de-

nied, 343 U. S. 966, in the course of his discussion of the point that, if a member of the crew was incompetent, it was not necessary to prove that the shipowner knew or had reason to believe he was incompetent.

Two later cases in this Circuit also follow the principle that there must be proof of incompetence on the part of an officer of the vessel to warrant a finding of unseaworthiness based upon "allegedly imprudent action by a seaman's superior." *Ezekiel* v. *Volusia S.S. Co.*, 2 Cir., 1961, 297 F. 2d 215, 217, cert. denied, 1962, 369 U. S. 843; *Pinto* v. *States Marine Corp.*, 2 Cir., 1961, 296 F. 2d 1, cert. denied, 1962, 369 U. S. 843. We adhere to these rulings.

Affirmed.

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SMITH, *Circuit Judge* (dissenting):

I dissent.

The central proposition of the Court's opinion is the rule stated in *Pinto* v. *States Marine Corp. of Delaware*, 296 F. 2d 1 (2 Cir. 1961), cert. den. 369 U. S. 843 and in *Ezekiel* v. *Volusia S.S. Co.*, 297 F. 2d 215 (2 Cir. 1961), cert. den. 369 U. S. 843, that the doctrine unseaworthiness does not extend to an injury caused by "an order improvidently given by a concededly competent officer on a ship admitted to be in all respects seaworthy," Gilmore & Black, The Law of Admiralty (1957), 320. Gilmore and Black call such a case "an almost theoretical construct." For two reasons I do not believe this proposition even if it still has vitality should control this case.

First, the proposition evidently refers to cases where there is alleged to be a negligent creation of unseaworthiness. Gilmore & Black cited *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372 (1918), *McMahon* v. *The Panamolga*, 127 F. Supp. 659 (D. Md. 1955), and *Imperial Oil, Ltd.* v. *Drlik*, 234 F. 2d 4 (6 Cir. 1956), all dealing either with negligence or the negligent creation of unseaworthiness.

In this case, however, appellant's claim for unseaworthiness which was dismissed did not depend on negligence; it survives the verdict making it implicit that there was no negligent order given.

Second, appellant does not admit that the ship was "in all respects seaworthy." His case is that the ship was unseaworthy because of the manner in which the rope was used. Whether an appliance or item of gear is serviceable and in good order cannot be determined abstractly. It depends on whether the gear is reasonably fit for its intended use. Inquiry into this involves determining both the purpose for which the gear is used, and the manner in which it is used. This is precisely what occurred in *American President Lines, Ltd.* v. *Redfern*, 345 F. 2d 629 (9 Cir. 1965), *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (3 Cir. 1964), and *Crumady* v. *The Joachim Hendrick Fisser*, 358 U. S. 423 (1959). In each of these cases there was unseaworthiness because gear was employed in a manner which turned out to be improper. In *Ferrante* it was "undisputed that the ship's equipment—the manilla ropes—was fit for its intended use." Yet it was used in an abnormal manner, and injury resulted. And in *Redfern*, the court said, "a stuck sea valve . . . is suitable only if operated by two men; otherwise it constitutes a dangerous condition," and held that the vessel was unseaworthy. In *Crumady*, unseaworthiness resulted when a circuit breaker safety device in a winch was set for a stress greater than the same working load on the unloading gear.

I see no meaningful difference between rendering safe equipment defective and unsafe, which is *Crumady*, see also *International Nav. Co.* v. *Farr & Bailey Mfg. Co.*, 181 U. S. 218 (1901), and using equipment in a manner which makes it unsafe, which is *Ferrante*, *Redfern*, and this case.

The fact that the unsafe method arose out of an order does not excuse the ship. An order usually lurks in the

background of the act of a seaman in the performance of his duties.

Nor is the fact that the crew was as a whole complete a bar to recovery. In the first place appellant alleges that it was the method of employing gear which made the vessel unseaworthy, not crew size or competence. Secondly, the argument that the crew as a whole was adequate is merely stating in another form the defense rejected in *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96 (1944), that the vessel had available safe equipment which was not used. The unseaworthiness issue in *The Magdapur*, 3 F. Supp. 971 (S. D. N. Y. 1933), was decided solely on the theory that the vessel as a whole was adequately manned. This rationale cannot stand in the face of the development of the doctrine in the intervening years, illustrated by the holding in *Mahnich*.

I would reverse for new trial on the unseaworthiness issue.

## Opinion of District Court

Plaintiff moves herein for a new trial on the grounds of three alleged errors arising during the course of the trial.

As to points 1 and 3, the motion is denied.

Point 2 asserts that the Court erred in failing to submit to the jury plaintiff's claim of unseaworthiness based on the alleged failure to provide sufficient manpower for the task of hauling and putting rope through the forward chock on the starboard aftpart of the defendant's vessel's main deck.

The following were the uncontroverted facts submitted to the Court and jury:

According to the Coast Guard certificate, the vessel was only required to carry on deck in the unlicensed department six able and three ordinary seamen; and in addition to the six able and three ordinary seamen she had a boatswain and two deck utility men. Her articles thus showed that she had three more unlicensed deck crewmen than her certificate required. At the time of the alleged accident, the vessel had on board every one of the deck crew shown on the articles.

The evidence further showed that, the vessel docking between 12 Noon and 4 P.M., there would in the ordinary course be one able seaman from the aft docking station at the wheel, acting as quartermaster; thus the full complement on the aft docking station during those hours would consist of five unlicensed members of the deck department under the command of the third officer, the five normally being three able and two ordinary seamen. At the time of the alleged accident and for a time prior thereto, there were five unlicensed men at the aft docking station, consisting of four able-bodied seamen and one ordinary seaman; thus the place of one ordinary seaman had been taken by an able-bodied seaman.

The alleged unseaworthiness consisted of the apportionment of the five men to do the various operation in that sector. Plaintiff claims that the condition which resulted from the third mate's apportioning of the men, i.e., two men assigned to do the work of three (plaintiff's expert testified that it was his opinion that the work ordered done was a three-four man job), regardless of whether the order was improvident or not, constituted unseaworthiness.

The Court, on the basis of the facts presented and the law, directed a verdict for the defendant on that claim. The Court's decision was based on a decision by Judge Patterson, in *The Magdapur*, 3 F. Supp. 971, 972-73 (S. D. N. Y. 1933), and certain language contained in *Pinto* v. *States Marine Corp.*, 296 F. 2d 1, 3 (2d Cir. 1961), cert. denied, 369 U. S. 843 (1962) and *Ezekiel* v. *Volusia S. S. Co.*, 297 F. 2d 215, 217 (2d Cir. 1961), cert. denied, 369 U. S. 843 (1962).

On reconsideration, I find these authorities both persuasive and controlling. Accordingly, plaintiff's contention as to point 2 is rejected, and plaintiff's motion is in all respects denied.

So ordered.

Dated: New York, New York,
November 9, 1964.

CHARLES H. TENNEY,
*U. S. D. J.*

## Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of January one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
*Chief Judge,*

HON. HAROLD R. MEDINA,
HON. J. JOSEPH SMITH,
*Circuit Judges.*

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JAMES J. WALDRON,
Plaintiff-Appellant,

v.

MOORE-MCCORMACK LINES, INC.,
Defendant-Appellee.

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Appeal from the United States District Court for the Southern District of New York,

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment and order of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk.